PARENT AND CHILD: DUTY OF SUPPORT AFTER DIVORCE.—Under the chancery practice the court had the inherent power to modify its decree whenever necessary to make it effective, and when jurisdiction had once attached the court, after final decree, could continue to exercise this jurisdiction whenever the exigencies of the case required. In California, however, the court has no such inherent power, and in divorce actions can only modify its judgments in the manner provided by section 138 and 139 of the Civil Code.[1] Section 138, as amended in 1905, provides that before or after final judgment and during the minority of the children of the marriage, the court may by order provide for the custody, care, education, maintenance and support of the children, while section 139 provides that where a divorce is granted for an offense of the husband, the court may "modify" its orders respecting allowance to the wife or children. As interpreted by the Supreme Court, section 139 only confers jurisdiction to modify an existing judgment in given respects, and if the original judgment makes no provisions for the wife or children, there is nothing in the decree which the court can modify. In such cases, therefore, the court's jurisdiction ceases immediately upon the entering of the final judgment. The power conferred by section 138, on the other hand, is not dependent upon the existence of any judgment, nor the provisions contained therein.[2] It has also been held that the jurisdiction conferred by these sections can be exercised, even though the modification of the judgment or the making of the order will result in setting aside a stipulation entered into between the parties, and made the basis of the decree.[3]

Where a decree of divorce awards to the mother the custody of the minor children, but makes no provision for their maintenance, what is the extent of the father's liability for the children's support? Upon this question a conflict of authority is presented. Generally the father's obligation to support his minor child was enforceable only under the poor laws and was considered as arising as an incident of his right to the child's custody, society and services. In some of the states of this country this theory of liability is adopted, and in these jurisdictions if, by a decree of divorce, the father is deprived of the custody of the child, his duty of support, except as provided for in the divorce decree, or by a subsequent modification thereof, is held to be at an end.[4] Hence,

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[1] Harlan v. Harlan (1908), 154 Cal. 341, 98 Pac. 32, overruling Shattuck v. Shattuck (1901), 135 Cal. 192, 67 Pac. 45; McKay v. McKay (1899), 125 Cal. 65, 57 Pac. 677.

[2] Harlan v. Harlan, supra, n. 1.

[3] Black v. Black (1906), 149 Cal. 224, 86 Pac. 505; Russel v. Russel (1912), 20 Cal. App. 457, 129 Pac. 467; Parkhurst v. Parkhurst (1897), 118 Cal. 18, 50 Pac. 9; Ex parte Gordan (1892), 95 Cal. 374, 30 Pac. 561.

[4] Note to Spencer v. Spencer (1906), 2 L. R. A. (N. S.) 851, 853; 9

where the decree makes no provision in regard to the maintenance of the children of the marriage, no recovery is allowed against the husband except through an application in the divorce action. The California cases, construing section 136 and 207 of the Civil Code, have established the rule of non-liability of the father under such circumstances.[5]

Another line of cases which seems to represent the weight and reason of authority in this country establishes the contrary rule, that an action may be maintained against the divorced husband although no provision for support is contained in the decree, either as originally rendered or subsequently modified. The reason underlying these decisions is that, even though the common law doctrine be sound, the father by his misconduct has forfeited all his rights to the child's custody and services, and cannot be heard to plead his own wrong in discharge of his liability to support his minor children. Another and better reason suggested is that it is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, and by proceedings to which they are not parties.[6]

In the case of *Lewis v. Lewis*[7] the District Court of Appeal allowed a recovery for support, maintenance and education at the suit of the minor child against her father, without requiring any application on the child's behalf in the divorce proceedings. The plaintiff's parents had been divorced by a decree which incorporated therein a stipulation entered into between the parties, whereby the wife was to have the custody and maintenance of the child, and was to receive a specified sum of money in complete satisfaction of all claims against the husband for support. It was contended on behalf of the defendant that no relief could be had in this suit, but only through an application in the divorce action for a modification of the decree. The court, however, held that recovery could be allowed, upon the ground that by section 206 of the Civil Code it was the legal duty of the defendant to support his child, who because of her infancy, was incapable of supporting herself. Although the result thus reached is perhaps a very desirable one, it seems that this decision is at variance with the rule of non-liability of the husband as established by the Supreme Court.[8]

J. D. R.

R. C. L., § 296; 2 Bishop, Marriage, Divorce and Separation, § 1154 et seq.

[5] Ex parte Miller (1895), 109 Cal. 643, 648, 42 Pac. 428; Selfridge v. Paxton (1905), 145 Cal. 713, 79 Pac. 425. See In re Campbell (1900), 130 Cal. 380, 62 Pac. 613; McKay v. McKay (1899), 125 Cal. 65, 57 Pac. 677.

[6] 9 R. C. L., § 296; Tiffany, Persons and Domestic Relations, 2nd ed., 255.

[7] (Mar. 16, 1916), 22 Cal. App. Dec. 607.

[8] The court argues that section 206 of the Civil Code imposes upon the parent a liability for support irrespective of the custody of the